Submission to the Joint Standing Committee on Migration – Inquiry into the Migration Treatment of Disability

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Immigration law acts to distinguish between the 'citizen and the stranger'.[144] The immigration health rules preserves the citizen's right of access to healthcare and community services, and minimises fiscal expenditure on migrants.[145] This submission juxtaposes the Canadian and Australian health criteria to demonstrate that the failure to take the applicant's personal financial circumstances into account may undermine the economic objectives of skilled migration. I suggest that it is necessary to amend the *Migration Regulations 1994* (Cth)[146] to allow the health criteria to be waived where the applicant can demonstrate that they can provide an economic or social benefit which may mitigate the estimated cost of healthcare or community services. This submission also considers the role of social policy in the discretion to waive the health criteria in family migration cases. It provides a survey of decisions concerning HIV-positive applicants for spouse/interdependency visas to demonstrate how social factors will often override the economic policy objectives underpinning the health criteria. The influence of social factors such as the role of the family and the emotional benefit of a stable relationship suggests that an applicant for a spouse, interdependency or child visa should not be denied entry on the basis that they have a disease or condition, which would be at a 'significant cost' to the Australian community.[147]

The Australian Immigration Health Rules

The immigration health criteria are designed to minimise Australia's welfare expenditure and maintain public health standards.[148] The primary health criteria are detailed in reg4005 of the *Regulations*:

> The applicant:
> (a) is free from tuberculosis; and
> (b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
> (c) is not a person who has a disease or condition to which the following subparagraphs apply:
> (i) the disease or condition is such that a person who has it would be likely to:
> (A) require health care or community services; or
> (B) meet the medical criteria for the provision of a community service;
> during the period of the applicant's proposed stay in Australia;

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[144] Ireh Iyioha, 'A Different Picture Through the Looking-Glass: Equality, Liberalism and the Question of Fairness in Canadian Immigration Health Policy', (2008) 22 *The Georgetown Immigration Law Journal* 621, 622.
[145] Department of Immigration and Citizenship, *Form 1163i: Health Requirement for Temporary Entry to Australia* (2009) Department of Immigration and Citizenship http://www.immi.gov.au/allforms/pdf/1163i.pdf at 3 September 2009, 1.
[146] 'The *Regulations*'.
[147] *Migration Regulations 1994* (Cth), reg 4005(c)(ii)(A).
[148] See LexisNexis *Australian Immigration Law*, vol 2, [20,710].

(ii) provision of the health care or community services relating to the disease or condition would be likely to:

(A) result in a significant cost to the Australian community in the areas of health care and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant.

Reg4005 cannot be waived. A list of visa subclasses required to comply with reg4005 is provided at **Annexure A**.

The immigration health rules are inconsistent with the *Disability Discrimination Act 1992* (Cth), which prevents a person from directly or indirectly treating a person with a disability less favourably than the person would treat another person without the disability in substantially similar circumstances.[149] This inconsistency is avoided as Divisions 1, 2 and 2A of Part 1 of the *Disability Discrimination Act* do not apply to decisions made under the *Migration Act 1958* (Cth).[150] However, the domestic application of the immigration health rules must now be evaluated in conjunction with the Government's international obligations under the *Convention on the Rights of Persons with Disabilities*.[151] The Government has asserted that it is unnecessary to abandon the immigration health criteria, declaring that the *Convention* does not

> create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.[152]

The Joint Standing Committee on Treaties has indicated that Australia's immigration health procedures conform to the requirements of the *Disability Convention*, as '[t]he processes apply to all applicants...and would not constitute discrimination under international law'.[153] This submission suggests that the domestic policy objectives could be balanced against Australia's obligations under the *Disability Convention* through the adoption of an objective health assessment, coupled with a case-by-case assessment of the migrant's potential economic and social contribution to Australian society.

Application of the Health Criteria

A visa applicant may be required to attend a medical assessment under s60 of the *Migration Act*. If the Minister is not satisfied that the applicant meets the health criteria, they must

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[149] *Disability Discrimination Act 1992* (Cth), ss 5(1), 6.

[150] *Disability Discrimination Act 1992* (Cth), s 52.

[151] *Convention on the Rights of Persons with Disabilities* (New York, 30 March 2007) [2008] ATS 12 (entry into force for Australia 16 August 2008) ('*Disability Convention*').

[152] See United Nations, *United Nations Enable: Rights and Dignity of Persons with Disabilities, Declarations and Reservations* United Nations http://www.un.org/disabilities/default.asp?id=475 at 12 September 2009.

[153] Joint Standing Committee on Treaties, *National Interest Analysis: United Nations Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 [2008] ATNIA 18*, Joint Standing Committee on Treaties http://www.aph.gov.au/house/committee/jsct/4june2008/treaties/disabilities_nia.pdf at 24 September 2009, 15.

decline to grant the visa.[154] In practice, most applicants for temporary visas are not required to undergo a medical assessment unless they are migrating from a country considered 'high risk', or if they plan to enter a classroom, are pregnant and intend to have their child in Australia, or intend to work in the medical profession.[155] However, applicants for permanent visas will generally be required to undergo a medical examination.[156]

The Minister 'must seek the opinion of a Medical Officer of the Commonwealth' (MOC) in 'determining whether the visa applicant meets the health criteria'.[157] The distinguishing feature of the Australian health criteria is the fact that the MOC must apply the health criteria objectively, without taking the applicant's ability to personally meet the cost of the health or community services into account.[158] The MOC must determine the 'form or level of condition suffered by the applicant', and then apply the statutory criteria to a 'hypothetical person who suffers from that form or level of the condition'.[159] The applicant will fail the health criteria if a hypothetical person who suffered from that disease or condition would be 'likely to require health care or community services', which would be at a 'significant cost' to the Australian community.[160] The MOC must not attempt to predict the likelihood of the applicant's need for health or community services,[161] as it would contradict the express statutory direction to assess the applicant *regardless* of whether the applicant is likely to use those services.[162] This process is justified on the basis that it would be inappropriate to require a MOC to inquire into the individual financial circumstances of every applicant.[163] However, reg4005 prevents the case officer from considering extraneous factors, including the potential for the applicant to make a social or economic contribution to the Australian community. The decision maker must take the opinion of the MOC as correct.[164] The opinion is excluded from merits review.[165] The applicant may only seek judicial review of the MOC's determination on the ground that it was not of a kind authorised by the *Regulations.*[166] If the applicant could not challenge the MOC's decision, they would be required to apply for the decision to be reviewed by the Migration Review Tribunal, and if the initial decision to refuse the visa was affirmed, apply to the Minister, who can substitute a more favourable decision if they believe it is in the public interest to do so.[167] The Minister is only likely to exercise this power if the applicant can demonstrate 'unique or exceptional circumstances', including threats to their personal safety,[168]

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[154] *Migration Act 1958* (Cth), s 65(1)(b).
[155] Department of Immigration and Citizenship, above n2, 2.
[156] Department of Immigration and Citizenship, *Form 1071i: Health Requirement for Permanent Entry to Australia* (2009) Department of Immigration and Citizenship http://www.immi.gov.au/allforms/pdf/1071i.pdf at 1 September 2009, 1.
[157] *Migration Regulations 1994* (Cth), reg 2.25A(1).
[158] See *JP1 v Minister for Immigration and Citizenship* (2008) 22 FLR 37, 48 (Riley FM).
[159] *Robinson v Minister for Immigration and Multicultural Affairs* (2005) 148 FCR 182, 194.
[160] *Imad v Minister for Immigration* [2001] FCA 1011, [13] (Heerey J).
[161] *Imad v Minister for Immigration* [2001] FCA 1011, [13] (Heerey J).
[162] See for example *Triandafillidou v Minister for Immigration and Multicultural Affairs* (2004) 181 FLR 302, 312 (Bryant CFM).
[163] *Imad v Minister for Immigration* [2001] FCA 1011, [14] (Heerey J).
[164] *Migration Regulations 1994* (Cth), reg 2.25A(3).
[165] *Manokian v Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 632, 633.
[166] *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115, [66].
[167] For example, see *Migration Act 1958* (Cth), s 351(1).
[168] *Migration Series Instruction MSI-386: Guidelines on Ministerial Powers under Sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958*, issued 14 August 2003, [4.2] ('*MSI-368*').

considerations of the role of the family unit,[169] the rights of the child,[170] whether refusal would cause considerable hardship to an Australian citizen, or whether the applicant could provide '**exceptional** economic, scientific, cultural or other benefit' to Australia.[171]

The fiscal cost approach is further entrenched through the Government's 'one fails, all fail' policy.[172] Under the 'one fails, all fail' policy, a visa will not be granted unless *all* members of the primary applicant's family unit[173] satisfy the health criteria.[174] In many cases, the visa will be denied on the grounds that one of the primary applicant's children has failed the health criteria.[175] The application of this policy in such circumstances, without allowing for consideration of the family unit's personal resources, may produce results which come to undermine the purpose of skilled migration. This issue was addressed by the Supreme Court of Canada in *Hilewitz v Minister of Citizenship and Immigration.*[176] The appellants' visas were denied on the basis that one of their children suffered from an intellectual disability which was likely to 'cause excessive demands on Canada's social services'.[177] The Court held that the Department had committed a jurisdictional error by failing to consider the 'personal circumstances of the families of disabled dependents'.[178] The Court held that the term 'excessive demand' is 'inherently evaluative and comparative'.[179] It would be impossible to determine what demands or costs would be placed on social services without considering the 'applicant's ability and intention to pay'.[180] Abella J noted that a purely objective approach, which failed to consider a 'family's actual circumstances', reflected a 'cookie-cutter methodology' which defeated the object of the legislation.[181]

The majority gave considerable weight to the fact that the appellants were applying for permanent residence under the investor and self-employed visa classes.[182] These visas can only be granted if the applicant can prove that they have 'substantial financial resources'.[183] In Australia, an applicant for an Investor (Provisional) visa must establish at the time of application that they have assets to a net value of at least $2,250,000.[184] In addition, the

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[169] As recognised in the *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, [1980] ATS 23, art 23.1 (entered into force for Australia on 13 November 1980); Department of Immigration and Citizenship, *MSI-386,* above n25, [4.2].
[170] As recognised in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4, art 3 (entered into force for Australia 16 January 1991); *MSI-386,* above n25, [4.2].
[171] *MSI-386*, above n25, [4.2].
[172] See LexisNexis, *Australian Immigration Law*, vol 5, Procedures Advice Manual, PAM3 [P Sch4.4005-4007.75], [75.1] ('PAM3').
[173] Defined in *Migration Regulations 1994* (Cth), reg 1.12.
[174] See PAM3, above n29, [P Sch4.4005-4007.75], [75.1].
[175] Examples include *Robinson v Minister for Immigration and Multicultural Affairs* (2005) 148 FCR 182; *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115; *Re Imani* [2001] MRTA 439 (5 February 2001); *Re V04/03228* [2005] MRTA 783 (25 July 2005); *Re Sese* [2003] MRTA 8702 (23 December 2003).
[176] [2005] SCJ 58.
[177] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [77] (Deschamps J).
[178] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [40] (Abella J).
[179] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [54] (Abella J).
[180] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [54] (Abella J).
[181] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [57] (Abella J).
[182] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [1] (Abella J).
[183] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [1] (Abella J).
[184] *Migration Regulations 1994* (Cth), Schedule 2, subclass 162, criterion 162.212(3).

applicant is required to have invested at least $1,500,000 by the time the visa is granted.[185] In this context, the failure to consider the applicant's personal ability to privately cover the costs of the health or community services could produce paradoxical results. As Abella J noted,

> It seems to be somewhat incongruous to interpret the legislation in such a way that the very assets that qualify investors and self-employed individuals for admission to Canada can simultaneously be ignored in determining the admissibility of their disabled children.[186]

In adopting a solely objective approach, the health criteria may ultimately undermine other immigration policy objectives. In practice, the strict application of the health criteria has ensured that migrants have better short-term health outcomes than the majority of the Australian-born population.[187] However, migrant outcomes are not the same across all visa subclasses. Empirical evidence suggests that applicants in the Family/Parents categories are far more likely to use healthcare services than 'all other migrant categories', as the applicants are generally older.[188] In addition, migrants in the Family/Parents categories are less likely to contribute to Commonwealth funds.[189] However, employer-sponsored migrants are the highest contributors to Commonwealth taxation revenues across all migrant classes.[190] Over time, the disparity in fiscal contributions from employer-sponsored migrants and other skilled stream categories (e.g. independent, student, regional sponsored) narrows, as younger members of the family unit enter the workforce, and the primary applicant's wages increase.[191] These potential fiscal benefits are not considered in the application of reg4005. However, in family migration cases where a health waiver is available, the Tribunal often gives considerable weight to the fact that the sponsor's contribution to tax revenue may significantly outweigh the cost of the visa applicant's medical expenses.[192] The Tribunal has also noted that the MOC's estimate as to the likely cost of the disease or condition does not include any benefit which the community may gain as a result of the applicant undertaking paid work in the future.[193] This submission suggests that reg4005 should be amended to incorporate such considerations into the determination of whether a visa applicant meets the health criteria.[194]

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[185] *Migration Regulations 1994* (Cth), Schedule 2, subclass 162, criterion 162.222(1).
[186] *Hilewitz v Minister of Citizenship and Immigration* [2005] SCJ 58, [39] (Abella J).
[187] Kerry Carrington, Alison McIntosh and Jim Walmsley, *The Social Costs and Benefits of Migration into Australia* (2007), 36.
[188] Access Economics, *2004 Update of the Migrants' Fiscal Impact Model* (9 July 2004), 12.
[189] Access Economics, *Migrants' Fiscal Impact Model: 2008 Update* (2008), 25.
[190] Ibid, 21.
[191] Ibid.
[192] For example, see *Re Jantakorn* [2002] MRTA 2494; *Re Abcdeav* [2004] MRT 203, [26]; *Re Abcdef* [2003] MRTA 4207, [42].
[193] *Re S* [1995] IRTA 6005.
[194] A similar approach has been adopted in Canada, see Citizenship and Immigration Canada, *Operational Bulletin 063B – July 29, 2009* (2009) Citizenship and Immigration Canada http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob063b.asp at 29 September 2009; Citizenship and Immigration Canada, *Medical Exam Requirements for Permanent Residents* (2002) Citizenship and Immigration Canada http://www.cic.gc.ca/english/information/medical/medexams-perm.asp at 20 September 2009.

Recommendation:

The health assessment process under regulation 4005 should be amended as follows:

(a) The MOC determines whether the applicant meets the criteria;

(b) If the applicant fails the health criteria, the decision maker should be required to forward a letter outlining the MOC's reasons for determining that the provision of healthcare or community services is likely to result in a significant cost to Australians; and

(c) The applicant should be given an opportunity to demonstrate any potential social or economic benefits which they may provide to Australian society.

The potential fiscal contributions of the primary and secondary applicants should be a relevant consideration in any challenge to the MOC's assessment.

Application of the Waiver Provisions

The primary health criteria are replicated in regs4006A and 4007. However, regs4006A and 4007 contain a waiver provision, which allows the Minister to waive the health criteria if:

(a) the applicant otherwise meets all other criteria for the grant of the visa; and
(b) the grant of the visa would not cause:
    (i) undue cost to the Australian community; or
    (i) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.[195]

An overview of the visa subclasses required to satisfy the criteria in regs4006A and 4007 is provided at **Annexure B**. Unlike reg4005, the selection of the subclasses required to satisfy reg4006A is primarily based on economic considerations. Holders of a subclass 457 visa are the second-highest contributors to Commonwealth taxation revenues across all migrant classes.[196] However, applicants entering under a subclass 457 visa are not permitted to access healthcare or pharmaceutical benefits during the term of their stay.[197] Thus, the visa applicant may provide substantial economic benefits to Australia without prejudicing access to healthcare or community services. The Minister may waive the requirements under reg4006A if the visa applicant's employer gives an undertaking that they will meet all relevant costs associated with the disease or condition.[198] In contrast, the power to waive the requirements of reg4007 is generally exercised for humanitarian or compassionate

[195] *Migration Regulations 1994* (Cth), reg 4007(2).
[196] Access Economics, above n46, 32.
[197] Ibid, 32.
[198] *Migration Regulations 1994* (Cth), reg 4006A(2).

reasons (particularly if the visa applicant has a close relationship with an Australian citizen).[199]

The health criteria cannot be waived if the applicant is found to have tuberculosis.[200] Therefore, the only requirement that can be waived by the decision maker or the Tribunal (upon review) is that under paragraph (1)(c) of regs4006A or 4007.[201] In addition, the decision maker can only consider exercising the power to waive where the MOC has already determined that the applicant is likely to present a 'significant cost' to Australia in the event that the visa was granted.[202] The power to waive is non-compellable.[203] However, government policy stipulates that the decision maker *must* consider exercising the power to waive in a case where the waiver provisions are relevant.[204] If the power to waive is to be exercised, the officer is not permitted to disregard, 'dispute or "review" the MOC's opinion'.[205]

The legislative reference to 'undue cost' or 'undue prejudice' necessarily suggests that the decision maker must engage in a balancing process, where a range of factors are considered.[206] The terms 'undue cost' or 'undue prejudice' are not defined in the *Regulations*. 'Undue cost' cannot be paralleled with 'significant cost', as it would 'leave no room for the waiver' provision to operate.[207] The cost of the applicant's disease or condition will only be 'undue' if it is 'unjustifiable', extends 'beyond what is warranted', or is 'excessive'.[208] This interpretation provides scope for subjective consideration of the applicant's personal circumstances and the potential benefit which they may provide to Australian society. As the Federal Court has noted, '[i]t may be to Australia's benefit in moral or other terms to admit a person even though it could be anticipated that such a person will make some significant call upon health or community services'.[209] The waiver provision may be used in order to give effect to broader social policies, including upholding the sanctity of marriage and the potential emotional and economic benefits that a stable relationship may provide to a family unit.[210]

However, Australia is far more stringent than other common law countries. For example, in Canada, a visa cannot be refused on the ground that the applicant 'might reasonably be expected to cause excessive demand on health or social services'[211] if the applicant is a 'spouse, common-law partner or child' of their sponsor.[212] This is designed to give effect to

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[199] Department of Immigration and Citizenship, above n13, 1.
[200] *Minister for Immigration and Multicultural Affairs v Seligman* (1999) 85 FCR 115, 127; *Migration Regulations 1994* (Cth), regs 4005(1)(a), 4006A(1)(a), 4007(1)(a).
[201] *Migration Regulations 1994* (Cth), regs 4006A(2), 4007(2); *Minister for Immigration v Schoeman* [2008] FMCA 671, [32].
[202] *Bui v Minister for Immigration and Multicultural Affairs* (1999) 85 FCR 134, 148.
[203] PAM3, above n29, [P Sch4.4005-4007.65], [66.1].
[204] Ibid.
[205] Ibid, [66.2].
[206] *Applicant Y v Minister for Immigration and Multicultural Affairs* [2008] FCA 367, [31] (Tamberlin J).
[207] *Re Papaioannou* [1991] IRTA 113.
[208] *Re Papaioannou* [1991] IRTA 113.
[209] *Bui v Minister for Immigration and Multicultural Affairs* (1999) 85 FCR 134, 148.
[210] *Re Taye* [1995] IRTA 5772.
[211] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 38(1)(c).
[212] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 38(2)(a).

the policy objective of family unity which underpins these visa classes.[213] However, applicants for an Australian spouse, interdependency or child visa will need to demonstrate the existence of 'compelling circumstances' before the power to waive the health criteria can be exercised.[214] Government policy expressly stipulates that the power to waive cannot be exercised solely on the basis that the relationship between the applicant and the sponsor is genuine.[215] The case officer must consider all the merits of the case, including the costs as estimated by the MOC,[216] the availability of 'private care and support',[217] and the location of the families of the applicant and sponsor.[218] However, Tribunal decisions concerning spouse/interdependency applications where the applicant is HIV-positive indicate that the power to waive is frequently exercised. The Tribunal has adopted a balancing process, by which the costs to the community are assessed in conjunction with the 'harm the applicant's departure would have on the applicant's spouse'.[219]

The Australian Government does not treat HIV/AIDS as a public health risk, unlike a disease such as tuberculosis.[220] HIV is assessed on the same basis as 'any other pre-existing medical condition'.[221] However, as HIV may be expensive to treat, it may attract 'costs well beyond a level considered reasonable for Australian taxpayers to bear'.[222] Tribunal decisions indicate that the cost of HIV/AIDS-related healthcare and community services is estimated at approximately $250,000 per person.[223] In practice, this suggests that any visa applicant found to be HIV-positive is likely to fail the health criteria. However, applicants who have a strong personal relationship with their Australian nominator often succeed in having the health requirements waived by the Tribunal. These cases frequently turn on the issue of whether the sponsor could successfully migrate to the visa applicant's country of origin. For example, in *Re Ra,*[224] the nominator's criminal record prohibited her from immigrating to the United States. At the time of the Tribunal's decision, the sponsor and applicant had been married for 7 years.[225] The applicant adduced medical evidence which indicated that his viral load was 'undetectable' and that he was unlikely to develop AIDS in the near future.[226] Member Cooke considered that the family would provide considerable contributions to the Australian community over the 'course of their normal working lives', which may 'offset any potential costs occasioned by the visa applicant's illness'.[227] In addition, the Tribunal attached considerable weight to the impact that a visa refusal would have on the parties' relationship:

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[213] Citizenship and Immigration Canada, *IP 8: Spouse or Common-law Partner in Canada Class* (2006) Citizenship and Immigration Canada http://www.cic.gc.ca/english/resources/manuals/ip/ip08-eng.pdf at 20 September 2009, 6.
[214] These examples are provided in PAM3, above n29, [P Sch4.4005-4007.91], [92.3].
[215] Ibid.
[216] Ibid, [PSch 4.4005-4007.91], [92.2].
[217] Ibid, [P Sch4.4005-4007.92], [92.5].
[218] Ibid, [P Sch4.4005-4007.92], [92.6].
[219] *Re KC* [1998] IRTA 12907.
[220] PAM3, above n29, [P Sch4.4005-4007.42], [42.1].
[221] Department of Immigration and Citizenship, above n13, 2.
[222] PAM3, above n29, [P Sch4.4005-4007.42], [42.1].
[223] For example, see *Re Amanda MacDonald (Member)* [2005] MRTA 103.
[224] *Re Ra* [2001] MRTA 3886.
[225] *Re Ra* [2001] MRTA 3886, [13].
[226] *Re Ra* [2001] MRTA 3886, [13].
[227] *Re Ra* [2001] MRTA 3886, [21].

> A failure to grant the visa would not only savage a self evidently viable and continuing 'spouse relationship' but the couple would be double jeopardised by their inability...to live in the visa applicant's country of origin as man and wife.[228]

In effect, if the visa were denied, the couple would have been deprived of the opportunity to live as a family unit.[229] However, the fact that the parties' could not maintain their relationship in Australia if the visa were denied is not decisive. For example, in *Re Vali,*[230] the nominator held dual Australian and Swiss citizenship. The parties were residing in Switzerland at the time of the application.[231] The Tribunal noted that the parties were able to maintain their relationship if they continued to reside in Switzerland, where they would also have access to a 'high quality medical system'.[232] These factors led the Tribunal to conclude that the grant of the visa would result in undue cost to the Australian community.[233]

Cases such as *Re Ra* demonstrate that the waiver provision will frequently be exercised where:

(a) the visa applicant is found to be asymptomatic;[234] and
(b) the parties were likely to be separated in the event the visa was refused.

However, the Tribunal will also consider the prevailing conditions in the applicant's country of origin. In *Re Christian,*[235] the nominator discovered she was HIV-positive when she became pregnant with her first child.[236] The applicant later discovered he was HIV-positive when the parties were living in Singapore.[237] The parties' submissions were summarised as follows:

> ...the parties' child has lived in Australia since he was three months old and that if the visa applicant was forced to leave Australia then the nominator and the parties' child would be faced with a decision to either remain in Australia without a father and a husband or go to Singapore where they would endure sub-standard medical facilities and where they would lose their strong support networks and cultural ties...due to the tragic circumstances of this case, the parties' child is reasonably likely to lose one or both of his parents before he reaches adulthood and that if the visa applicant has to leave Australia then his son would be precluded from knowing or developing a relationship with him.[238]

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[228] *Re Ra* [2001] MRTA 3886, [22].
[229] *Re Ra* [2001] MRTA 3886, [20].
[230] [2000] MRTA 3090.
[231] *Re Vali* [2000] MRTA 3090, [6].
[232] *Re Vali* [2000] MRTA 3090, [25].
[233] *Re Vali* [2000] MRTA 3090, [25].
[234] This was mentioned in *Re Ra* [2001] MRTA 3886, [27], see also *Re Taye* [1995] IRTA 5722; *Re FD* [1996] IRTA 8032; *Re Wood* [1998] IRTA 13168.
[235] [2002] MRTA 5266.
[236] *Re Christian* [2002] MRTA 5266, [11].
[237] *Re Christian* [2002] MRTA 5266, [11].
[238] *Re Christian* [2002] MRTA 5266, [41].

In this case, the interests of the child and the inadequacy of medical treatment in the applicant's country of origin were held to constitute compassionate grounds sufficient to waive the health requirements.[239]

Recommendation:

Department policy expressly provides that the power to waive cannot be exercised merely on the basis that the relationship between the parties is genuine.[240] However, the Tribunal decisions indicate that the 'significant cost' of the healthcare and/or community services required by the migrant will often be outweighed by the social benefits gained through family migration. This submission suggests that these social benefits should be given statutory recognition. In effect, a spouse, child or independency visa should not be denied on the basis that the applicant has a 'disease or condition' which likely to result in a 'significant cost' to the Australian community. This approach would give equal recognition to all visa applicants, eliminating the need to undertaking a balancing of interests in each individual case.

[239] *Re Christian* [2002] MRTA 5266, [42]. The facilities available in the applicant's country of origin were also relevant in cases such as *Re N04/04647* [2006] MRTA 7, [49]-[50].
[240] PAM3, above n29, [P Sch4.4005-4007.92], [92.3].

Annexure A

Visa classes required to satisfy regulation 4005

Subclass	Name
103	Parent
105	Skilled – Australian linked
106	Regional-linked
114	Aged Dependent Relative
115	Remaining Relative
116	Carer
117	Orphan Relative
118	Designated Parent
119	Regional Sponsored Migration Scheme
120	Labour Agreement
121	Employer Nomination
124	Distinguished Talent
126	Independent
132	Business Talent
134	Skill Matching
135	State/Territory-nominated Independent
136	Skilled-Independent
137	Skilled – State/Territory-nominated Independent
138	Skilled – Australian-sponsored
139	Skilled – Designated Area-sponsored
143	Contributory Parent (if the applicant was not the holder of a subclass 173 visa or substituted subclass 676 visa at the time of application)[241]
151	Former Resident (if outside Australia)
160	Business Owner (Provisional)
161	Senior Executive (Provisional)
162	Investor (Provisional)
163	State/Territory Sponsored Business Owner (Provisional)
164	State/Territory Sponsored Senior Executive (Provisional)
165	State/Territory Sponsored Investor (Provisional)
173	Contributory Parent (Temporary)
175	Skilled - Independent
176	Skilled - Sponsored
405	Investor - Retirement
411	Exchange
415	Foreign Government Agency
804	Aged Parent (if the applicant did not hold a substituted subclass 676 visa at the time of application)[242]
835	Remaining Relative
836	Carer
837	Orphan Relative
838	Aged Dependent Relative
845	Established Business in Australia
846	State/Territory Sponsored Regional Established Business in Australia (if the applicant does not reside or propose to reside in a participating State or Territory)[243]
855	Labour Agreement (if the applicant does not reside or propose to reside in a participating State or Territory)[244]

[241] See *Migration Regulations 1994* (Cth), Schedule 2, subclass 143, criterion 143.225.
[242] *Migration Regulations 1994* (Cth), Schedule 2, subclass 804, criterion 804.225.
[243] *Migration Regulations 1994* (Cth), Schedule 2, subclass 846, criterion 846.224(c).
[244] *Migration Regulations 1994* (Cth), Schedule 2, subclass 855, criterion 855.224(c).

856	Employer Nomination Scheme (if the applicant did not hold a skilled- Independent Regional (Provisional)(Class UX) visa, or; a Subclass 475 (Skilled-Regional Sponsored) visa, or; a Subclass 487 (Skilled-Regional Sponsored visa); or did not reside or propose to reside in a participating State or Territory)[245]

Annexure B

Visa classes required to satisfy regulation 4006A

Subclass	Name
418	Educational
457	Business (Long Stay)

Visa classes required to satisfy regulation 4007[246]

Subclass	Visa
100	Spouse
101	Child
102	Adoption
110	Interdependency
137	Skilled – State/Territory-nominated independent (certain applicants)
151	Former Resident (if a defence service applicant)
200	Refugee
201	In-country Special Humanitarian
202	Global Special Humanitarian
203	Emergency Rescue
204	Woman at Risk
300	Prospective Marriage
309	Spouse
310	Interdependency
415	Foreign Government Agency*
418	Educational*
419	Visiting Academic*
420	Entertainment*
421	Sport*
422	Medical Practitioner*
423	Media and Film Staff*
427	Domestic Worker (Temporary) – Executive*
428	Religious Worker*
442	Occupational Trainee*
445	Dependent Child
447	Secondary Movement Offshore Entry (Temporary)
449	Humanitarian Stay (Temporary)
451	Secondary Movement Relocation (Temporary)
457	Business Entry (Long Stay)*
461	New Zealand Citizen Family Relationship (Temporary)
571	Schools Sector*
572	Vocational Education and Training Sector*
573	Higher Education Sector*
574	Postgraduate Research Sector*
580	Student Guardian*

[245] *Migration Regulations 1994* (Cth), Schedule 2, subclass 856, criterion 856.224(a), (b).

[246] See PAM3, above n29, [P Sch4.4005-4007.90], [90.4]. Classes marked with a * indicate that the waiver only applies where regulation 2.07AO applies to the applicant.

787	Witness Protection (Trafficking) (Temporary)
801	Spouse
802	Child
804	Aged Parent*
814	Interdependency
820	Spouse
826	Interdependency
837	Orphan Relative
852	Witness Protection (Trafficking) (Permanent)
855	Labour Agreement*
856	Employer Nomination Scheme
857	Regional Sponsored Migration Scheme* (certain standard applicants)
858	Distinguished Talent*
864	Contributory Aged Parent*
884	Contributory Aged Parent (Temporary)*
890-893	Business Skills

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